Supreme Court U.S.
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No. 02-744

IN THE

Supreme Court of the United States

MONICA LYNN COLEMAN
AND
COLEMAN CRATEN, LLC,
Petitioners

v.

LORI SIMPSON,
Respondent

REPLY BRIEF

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I. Respondent's Factual Statements Are Inconsistent With The Lower Court Record

Respondent asserts that petitioner included facts not properly before the lower courts, and further asserts that petitioner made misstatements of certain other facts (Opposition Brief (Op.Br.) at p. 2, ¶ 3), but respondent provides no specific evidence to support her allegations which makes it impossible to defend with particularity. Respondent then purports to correct the record with her own Statement of Facts and Statement Of The Case (Op.Br. at p.2-4), which refutes petitioner's Statement Of The Case (Pet. at 9-15). Respondent's statements are inconsistent with the court record, while petitioner's representations are accurately depicted in same as specifically evidenced herein.

A. Respondent's Appointment As Trustee Of Both Estates Is An Unresolved Genuine Issue Of Material Fact In Dispute Properly Raised By Petitioner

Respondent asserts that she was "duly" appointed to serve as the Chapter 7 trustee in both of the above-referenced bankruptcy cases (Op.Br. at p. 3, ¶ 1). However, petitioner's claim had specifically challenged respondent's appointment because respondent had been assigned as trustee of Coleman Craten, LLC by engaging in activities in violation of bankruptcy law and failed to disclose said activities to the court.

1. Respondent Facilitated The Emergency Hearing For Conversion Of The Coleman Craten, LLC Bankruptcy And For Joint Administration ("the Hearing") Using The Hydes As An Instrument.

At the time that respondent was appointed as chapter 7 trustee of petitioner's personal estate on May 11, 1999, she had not yet been assigned to the bankruptcy estate of Coleman Craten, LLC. As respondent points out, joint administration of the estates was the result of the hearing requested by the Hydes, wherein respondent was a witness (Op.Br. at p. 3, ¶ 2), but it was actually the respondent who facilitated the hearing.

a. The Hearing Was Requested By The Hydes *Based* On Information Provided To Them By Respondent

On May 13, 1999, both in testimony and via supporting motion, the Hydes' attorney, Nancy Alquist, Esquire, ("Ms. Alquist"), indicated that her request for an emergency hearing based on "exigent circumstances" was prompted by information provided to her by respondent.

In her affidavit, respondent also acknowledged that participation in the hearing by the Office of the U.S. Trustee was prompted by respondent.

b. The "Exigent Circumstance" Information Presented To The Court Was Information Obtained Through A Search And Seizure Conducted By Respondent Without Notice, Disclosure Or Court Order. Respondent Did Not Inform The Court At The Hearing That She Had Conducted A Search And Seizure, But Merely Stated That She Had Found The Information As A Result Of Performing Her Duty In Collecting The Assets Of The Estate

According to Ms. Alquist's testimony, the hearing based on exigent circumstances was facilitated by information obtained within petitioner's home by respondent. Petitioner's claim asserted that the method respondent used to collect the property; i.e., a search and seizure without court order, was a violation of bankruptcy law and her rights therein. In presenting the "exigent circumstance" evidence to the court, respondent did not disclose to the court that she had searched and seized the property, but merely stated that she obtained the evidence by performing her duty in collecting the assets of the estate.

Pro se petitioner was not provided notice of the hearing, was not in attendance, and motions for postponements so that petitioner could attend, proffered by corporate attorney, were denied. Thus, petitioner was unable to defend statements made by respondent at hearing. Later, it was shown that respondent misrepresented

documents found. For example, a deposit slip found in petitioner's home belonging to the Hydes was presented by respondent as a deposit to an unknown account representing an attempt by petitioner to defraud creditors. Petitioner argued that said representations were a violation of respondent's duties to properly investigate the financial affairs of the debtor prior to taking action (citing *In re Bowman,* 181 B.R. 836, Bkrtcy.D.Md., 1995 and *Bennitt v. Williams*, [1989, CA9 Ca] 892 F.2d 822, 19BCD, 1873, CCH Bankr L.Rptr II 73131)..

c. The Court Ruled That The "Exigent Circumstance" Information Provided Was Insufficient And Inconclusive (Pet. at 23).

d. Court Granted Motions Based On Respondent's Support Of The Conversion and Inaccurate Representation That The Corporation Was A Stockbroker Under The Code.

2. Respondent Failed To Disclose Relevant Material Information To The Courts And To Other Interested Parties In The Estates That Would Have Precluded Joint Administration With One Trustee

a. The Hydes Were Not Creditors Of Petitioner's Personal Estate And Represented An Adverse Interest To The Personal Estate

Respondent now contends that the Hydes were creditors of petitioner's personal estate (Op.Br. at p. 3, ¶2), which is contrary to the lower court record that states:

"The Hydes represented an adverse interest to the personal estate, as they were not creditors of Coleman's personal bankruptcy estate, but were attempting to become creditors through an unadjudicated, disputed issue wherein the Hydes were alleging wrongdoing of the debtor of the personal estate to which the Trustee was assigned while the Debtor was acting as an officer of an affiliate corporation" (Petitioner's Memorandum of Law Supporting Summary Judgment *citing* Adversary Proceeding No. 99-05616 Hyde v. Coleman). **The averments *were undisputed by***

respondent and remained undisputed throughout subsequent appellate proceedings. As Respondent did not deny the averment, and therefore, pursuant to F.R.Civ.P 8(d), it cannot now be disputed.

A trustee is acting outside the scope of her authority, where there is *a potential conflict of interest or the prerception of one*, and the trustee's interest is materially adverse to the estate or the creditors, thereby making it improper and outside her authority for the trustee to pursue such involvement (*In re BH&P, Inc.* 949 F.2d 1300, 21 C.B.C. 2d855 (3rd Cir. 1991). Accord *In re Jack Greenberg, Inc.*, 189 B.R. 906 (Bankr Ed. Pa. 1995). Court records contain statements by major creditors claiming injury caused by respondent's actions.

b. Respondent hired an insider who had represented the Hydes' interests without disclosing the relationship to the court or other interested parties in the estates.

11 U.S.C. § 327 specifically precludes a trustee from hiring someone who has represented a party who has an adverse interest to the estate and requires that a person be "disinterested" (11 U.S.C. § 327(a)). To be disinterested, a person must not be an insider (11 U.S.C. §14(A)); or have represented an adverse interest (and 11 U.S.C. § 14(E)). An insider includes anyone who has been in control of the debtor (11 U.S.C. § 101 (31)(B)(iii)). A trustee is liable if she engages in any formal relationship that would make the trustee an "interested party" (*In re Paolino,* 80 B.R. 342, 345 (Bankr. E.D. Pa. 1987). Mr. Gray was an interested party (Pet. at pp 12-15). Thus, respondent became an interested party when she hired as her agent, Mr. Gray, who was an interested party as defined under bankruptcy law.

3. Petitioner Was Entitled To Summary Judgment Under *Moser v. Darrow*

According to this Honorable Court's ruling in *Moser v. Darrow*, a trustee is liable if she does that which she is not authorized to do under bankruptcy law (*Moser v. Darrow*,

341 U.S. 267, 1951; *See also* Pet. at pp 25-27).

The following facts in the record were undisputed. The Hydes represented an adverse interest. Mr. Gray represented the interests of the Hydes and had control of the debtors. Mr. Gray was an insider who also represented an adverse interest, and therefore, Mr. Gray was an interested party as defined under bankruptcy law. Immediately after meeting with the Hydes, respondent hired Mr Gray, and along with him searched and seized petitioner's home without a court order; contacting the Hydes with what they had found. On the same day, along with the Hydes, respondent and Mr. Gray presented the information found to the court, but failed to disclose the activities and relationships amongst the parties. In fact, not only did the parties not disclose relationships to the court at the hearing, but when they finally filed the *nunc pro tunc* contract hiring Mr. Gray, a month and a half later, the parties, including respondent, denied that Mr. Gray had any relationship with creditors and swore that Mr. Gray was not an interested party.

Rule 2009 prohibits joint administration with a single trustee where there are potential conflicts of interest (U.S. Bankruptcy Rule 2009; *see also* 2 Collier on Bankruptcy, Section 302, "Legislative History to Section 302" *citing* House Report No. 95-595, 95th Cong., 1st Sess. 321 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 32 (1978)). The Hydes unadjudicated allegations attempting to become creditor's of the personal estate, by-passed through activities of respondent, represented *at least* a potential conflict of interest to the creditors of the personal estate

Therefore, petitioner argued that respondent would not have been assigned as trustee of Coleman Craten, LLC had she disclosed material information to the court as required under bankruptcy law. Moreover, petitioner argued that undisputed facts entitled petitioner to summary judgment as respondent took actions specifically prohibited under bankruptcy law.

B. Bankruptcy Court Granted Summary Judgment Despite Willful and Deliberate Violations Ruling That A Trustee May Only Be Held Liable For Willful And Intentional "Misconduct".

In the instant case, in making it's deliberation, the bankruptcy court noted how respondent had argued that she was immune from suits for conduct taken in her official capacity [whether or not the action was in violation of statute or case law] (Pet. at 48, ¶1). Respondent further asserted that petitioner lacked evidence, "especially in light of the broad protections afforded to trustees under the law" (Pet. at 48-49). The bankruptcy court agreed, ruling that trustees may only be held liable for willful and intentional "misconduct", and that there is no "misconduct" in the instant case because respondent's activities were done while carrying out her duties (Pet. at 49, ¶1).. This ruling is contrary to this Honorable Court's ruling in Moser, where it was found that trustees are liable for actions taken while carrying out their duty if those actions are forbidden under bankruptcy law (*Id.*). Relying on "broad protection" language, the bankruptcy court expands a trustee's scope of authority beyond that defined under *Moser*. Indeed, the 4th Circuit has shown a willingness to expand a trustee's authority and protection under the "wide discretion" dicta of *Weintraub* (*See U.S. v. Patrick, 916 F.Supp 567 (N.D.W.Va. 1996)).*

Given the bankruptcy court's ruling and other rulings from the 4th circuit, inconsistent with other jurisdictions that result in a change in the standard of immunity for a trustee, it is proper for petitioner to ask this court to review this important federal question.

C. Abandonment Is Not An Issue As Respondent Did Not Raise It In The Lower Court; Respondent Made Statements Showing Abandonment Was Not An Issue: And If Abandonment Is Applicable, Court Erred In Granting Summary Judgment As Abandonment Would Be An Unresolved Genuine Issue Of Material Fact In

Dispute.

Respondent asserts that the property was abandoned (Op.Br. p. 3). Respondent had not raised this issue in the bankruptcy court, but had only begun asserting abandonment in the lower appellate courts, even though in both her affidavit and deposition respondent acknowledged that abandonment was not an issue. Appellate courts ignored this issue in their rulings. Since it was not raised in the bankruptcy court, it cannot now be argued before this Honorable Court (Op.Br. at pp 8-9, No. 3).

Moreover, respondent's own testimony belies abandonment, wherein respondent stated in her affidavit:

"On May 13, 1999, I, together with my counsel and liquidator, WT&P and FCI [Mr. Gray], respectively, went to the Residences for the purpose of (a) inspecting these assets of the Monica Coleman Estate; (b) securing these assets of the Monica Coleman Estate; and commencing the performance of my duties to administer and liquidate these assets. I had brought with me to this inspection of Monica Coleman Estate assets a locksmith for the purpose of gaining access to the Residences and changing the locks so that as Trustee I could properly perform my duty of taking and maintaining custody and control over assets of the Monica Coleman Estate".

In the event that this Court finds abandonment an issue, then the lower court erred in granting summary judgment. Summary judgment is improper if there is a genuine issue of material fact in dispute (*Celotex Corp. v.* Catrett, 477 U.S. 317, 322 (1986)). Though respondent *now* alleges abandonment, there is significant evidence in the lower court record that refutes an assertion abandonment (Pet at. 24). Since respondent had not raised abandonment as an issue, it was never adjudicated before the lower court. Thus, if abandonment is a pivotal issue, and it is not barred because it was not preserved, then summary judgment should not lie as the trier of fact did not determine the issue.

II. Constitutionality May Be Raised As The Matter Had

Been Raised In The Lower Court

Respondent argues that because petitioner had not raised the constitutionality of the Fourth Amendment in respondent's collection of the property, it may not now be reviewed by this Court (Op .Br. pp 5-9). However, it has long been established that "so long as the matter is brought to the attention of the state court, no particular form of words or phrases is required" Federal Rules Digest *citing Green Bay & Miss. Canal Co. v. Pattern Paper Co.* 172 U.S. 58 (1898). While the record must show that an issue under the U.S. Const. *or Code* was necessarily raised before the state court, the modern view is that it is not essential that a specific provision of the Constitution or Code be pointed out, set out verbatum, or cited (Federal Rule Digest 3.76 *citing Bride Prop. v. Hoboken Co.*, 68 U.S. 116 (1863); *Furman v. Nichol* 75 U.S. 44 (1868), *Copperweld Steel Co. v. Industrial* 324 U.S. 780 (1887), respectively).

In petitioner's initial complaint and subsequent filings therein, petitioner had properly argued the matter before the court. Upon filing the adversary proceeding, petitioner stated: "On May 13, 1999, Ms. Simpson [respondent] waited for the Colemans to leave their home. Without notice, disclosure, or a Court Order, Ms. Simpson then broke into the home, searched the premises, changed the locks, and left the Debtor, her husband and their ten-year-old son on the street. Ms. Simpson confiscated all real and personal property, as well as all documents" (Complaint Against Chapter 7 Trustee In Adversary Proceeding, Case. No. 99-5665/99-5667). Additionally, petitioner reiterated her argument in her Motion For Summary Judgment, wherein she specifically used search and seizure language in her argument. Petitioner asserted that said behavior was beyond the respondent's scope of authority under both bankruptcy statute and case law and petitioner continued to argue this matter in the appellate courts.

Therefore, in accordance with the rulings set forth herein, it is proper for petitioner to ask this Court to review

the Constitutionality and the Statutory propriety of respondent's actions.

III. Cases Presented By Petitioner Are Relevant To Questions Asked

Respondent argues that petitioner has presented a "disingenuous" argument filled with irrelevant cases and purports that there are insufficient findings to rise to the level of review by this Honorable Court (Op.Br. pp 9-13). However, in addition to the fact that there are more cases cited than acknowledged by respondent, the cases are relevant and on point. Though addressing other areas as well, the cases rule on trustees' general rights to search and seize, and taken in their entirety, are substantial.

Respondent argues that *Kane v. Smith* (355 P.2d 827 (Wash. 1960)) is irrelevant because it involves a case determining whether a turnover order obtained by a trustee can be enforced in a state court (Op.Br. at p. 11, ¶2). However, as petitioner points out, the case is relevant as it also defines trustee turnover procedures, particularly if a trustee suspects wrongdoing of a debtor. Moreover, the *Kane* court explains the need for court intervention in order to preserve the validity of the turnover procedures in other courts (Pet. at 17, ¶3). Thus, not only is it relevant to the instant case because respondent did not follow the procedures, it is also relevant because the standard of showing exigent circumstances by clear and convincing evidence required under the *Kane* ruling would not have been met, as on the same day as the seizure, the bankruptcy court ruled that there was insufficient and unconvincing evidence presented to support exigent circumstances (Pet at 23).

Likewise, in both U.S. v. Masterson and Applicatiojn of Trustee In Bankr. For Search Warrant, without distinguishing between corporate or personal debtors, the courts define the general rights of search and seizure activities performed by trustees within their circuits (Pet. at 15-25). And in *Masterson*, the court's analysis with

trespass and rights akin to private citizens *is* directly inconsistent with this Honorable Court's ruling in *Bivens v. Six Unknown Named Agents* (Id.). In *U.S. v Patrick*, a 4th Circuit case, the rationalle used by the court, again relying on the wide discretion dicta of *Weintraub*, clearly could be interpreted to include activities involving individuals as well as corporations (*U.S. v. Patrick*, 916, 570, 571 F. Supp. 567 (N.D.W.Va. 1996). The rulings by the courts in the present case support that the Patrick court intended to include individuals in it's interpretation of an expansion of power to trustees on a "wide discretion" basis.

IV. Summary Judgment Is Not Proper Where There is A Genuine Issue of Material Fact Whether Petitioner Had Complied With Discovery.

Respondent argues that *Wood v. Allstate Ins. Co.*, 21 F.3d 741, 745 (7th Cir. 1994) is not relevant as it involves insurance claims (Op.Br. at 18, ¶2). The *Wood* relevance is clarified in *Powell v. U.S. Fidelity and Guar. Co.*, 855 F.Supp. 858 (E.D.Va. 1994). Citing *Wood,* The *Powell* court explains that in civil suits, such as the instant case, when there is a genuine issue of material fact concerning compliance with discovery, summary judgment should be denied [to respondent] (*Id. at* 861). In the instant case, respondent's violations of bankruptcy law were clearly reflected within the court records. There was no other evidence required. Petitioner's testimony was not material as petitioner was not aware of respondents actions and did not participate therein. Petitioner had raised this material dispute regarding her compliance with discovery before the bankruptcy court. And at the time of the ruling, the court had not resolved the dispute. Therefore, petitioner's testimony is not material, and in accordance with the ruling in *Powell* and *Wood,* respondent should not have been granted summary judgment.

Conclusion

Petitioner prays that this Honorable Court will accept the Petition for Writ of Certiorari.